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May 5, 1997

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BY HAND DELIVERY

William Caton
Office of the Secretary
Federal Communications Commission
1919 M Street, Room 222
Washington, D.C. 20554

Re: ACSI's Petition for Declaratory Ruling Regarding Preemption of the Arkansas Telecommunications Regulatory Act of 1997 -- CC Docket No. 97-100

Dear Mr. Caton:

Please find enclosed for filing the original together with fifteen copies of the Comments of Southwestern Bell Telephone Company. We are also sending one copy of these Comments to Janice Myles, Common Carrier Bureau, and to ITS, Inc., as requested by the Commission in its Public Notice of April 3, 1997.

Please stamp and return the extra copy to the messenger.

Sincerely,

Michael Kellogg

Michael K. Kellogg

Enclosures

No. of Copies rec'd 0+13
List ABCDE

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| American Communications Services, Inc.'s | ) | CC Docket No. 97-100 |
| Petition for Declaratory Ruling Regarding | ) | |
| Preemption of the Arkansas Telecom- | ) | |
| munications Regulatory Reform Act of 1997 | ) | |

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May 5, 1997

## TABLE OF CONTENTS


Page

SUMMARY . . . . . i

BACKGROUND . . . . . 1

I. The Arkansas Act . . . . . 2

II. The SWBT/ACSI Interconnection Agreement . . . . . 5

ARGUMENT . . . . . 6

I. There is No Conflict Between the Arkansas Act and the Federal Act . . . . . 7

II. ACSI Has Failed to Justify Preemption Under Section 253(d) . . . . . 13

III. ACSI Has Improperly Invoked Section 252(e)(5) . . . . . 14

IV. There is No Conflict Between the Arkansas and Federal Universal Service Provisions . . . . . 16

CONCLUSION . . . . . 18

## SUMMARY

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("Telecommunications Act" or "1996 Act"), is a landmark piece of legislation that, for the first time, imposed obligations on incumbent local exchange carriers to negotiate in good faith with would-be competitors over terms for interconnecting their respective networks, unbundling network elements, and reselling telecommunications services. As Congress was debating the final terms of the Telecommunications Act, the General Assembly of the State of Arkansas undertook to examine the impact of the proposed federal regulatory changes on the provision of intrastate telecommunications services. On February 4, 1997, the Governor signed the Arkansas Telecommunications Regulatory Reform Act of 1997 ("Arkansas Act"), the express purpose of which was to "implement[] the national policy of opening the telecommunications market to competition on fair and equal terms, modif[y] outdated regulation, eliminat[e] unnecessary regulation, and preserv[e] and advanc[e] universal service." Arkansas Act § 2(1).

American Communications Services, Inc. ("ACSI") has now petitioned the FCC to preempt the statutory authority of the Arkansas Public Service Commission ("Arkansas PSC") over interconnection, unbundling, and resale. According to ACSI, the Arkansas PSC cannot arbitrate and approve interconnection agreements as contemplated by the Federal Act because it lacks authority, under the Arkansas Act, to go beyond the requirements of the Federal Act. ACSI argues that there is a direct conflict between the Arkansas Act and the Federal Act such that the former must be preempted by the latter. But even a cursory review of the text of the Arkansas Act reveals that far from being in conflict with one another, the two legislative regimes are entirely and expressly compatible.

ACSI argues that the Arkansas Act is preempted under section 253 of the Communications Act, which prohibits states from erecting barriers to entry. In order to prevail on this argument, however, ACSI would have to demonstrate that one or more provisions of the Arkansas Act effectively prohibit it from providing a telecommunications service. ACSI has not even attempted such a demonstration.

ACSI also argues that it is entitled to have the FCC preempt the authority of the Arkansas PSC under section 252(e)(5) of the Communications Act. While the FCC may preempt the jurisdiction of a State commission when that commission has failed to carry out its responsibilities under section 252, ACSI has not even alleged — let alone proven — that any such failure to act has occurred.

Finally, ACSI argues that the Arkansas Act has established eligibility requirements for intrastate universal service support that are inconsistent with federal requirements. But there is no inconsistency between the federal and state statutory eligibility requirements, because they apply to entirely different universal service funds. In addition, neither the federal nor the Arkansas state regulations have been promulgated yet, so it is premature for ACSI to be arguing that the Arkansas scheme is inconsistent with the federal requirements. When relying on the alternative argument that the Arkansas Act's universal service provisions constitute a barrier to entry under section 253, ACSI does not even attempt to demonstrate how the Arkansas Act's universal service eligibility requirements prohibit it from providing a telecommunications service.

With ACSI's petition, the Commission is once again confronting the question whether and to what extent state regulation of the local exchange markets is compatible with the requirements of the federal Communications Act. Congress clearly contemplated that the two regulatory

schemes would function in tandem; so did the Arkansas General Assembly when it recognized that "[i]t is essential that the State of Arkansas immediately revise its existing regulatory regime for the telecommunications industry to ensure that it is consistent with and complementary to the Federal Telecommunications Act of 1996." Arkansas Act, § 16(III). State regulation is permissible except where it directly conflicts with federal law or where the state legal requirement prohibits the ability of an entity to provide a telecommunications service. Under this standard, the FCC may not preempt any of the provisions of the Arkansas Act challenged by ACSI.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| munications Regulatory Reform Act of 1997 | ) | |

## COMMENTS OF SOUTHWESTERN BELL TELEPHONE COMPANY

Southwestern Bell Telephone Company ("SWBT")[1] submits these comments in response to ACSI's petition seeking a declaratory ruling that certain provisions of the Arkansas Act are preempted by the Communications Act and asking the Commission to divest the Arkansas PSC of its statutory jurisdiction over local interconnection agreements. SWBT opposes ACSI's efforts to have the Commission block Arkansas' enforcement of its laws opening intrastate telecommunications markets to competition.

## BACKGROUND

The Telecommunications Act of 1996 was passed in February 1996 "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all

[1]SWBT is a common carrier provider of exchange access and exchange telecommunications services in Arkansas, Kansas, Missouri, Oklahoma, and Texas. SWBT is owned by SBC Communications Inc., a holding company that does not itself provide any services directly to the public.

Americans by opening all telecommunications markets to competition."[2] Congress was aware that these ambitious goals could be frustrated if state and local governments were permitted to erect barriers to entry, but Congress also understood that states must be free to regulate on a competitively neutral basis to preserve and advance universal service, protect public safety and welfare, ensure the continued quality of telecommunications services, and safeguard consumer rights.

## I. The Arkansas Act

The Arkansas Act is the product of a legislative process that began months before the passage of the 1996 Act and that sought to reform Arkansas' telecommunications regulatory environment to respond to developments in both technology and in federal law. In November 1995, the Arkansas Legislative Council passed a resolution in which it recognized that "the regulatory environment in which [the] telecommunications industry operates has not kept pace with the technological changes this industry is experiencing."[3] The Legislative Council acknowledged further that "the enactment of changes at the federal level could have a profound effect on the citizens of Arkansas and the regulatory authority of the Arkansas Public Service Commission as it relates to telecommunications."[4] Believing that "any changes in the regulatory

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[2]Joint Explanatory Statement of the Committee of Conference, S. CONF. REP. NO. 104-230, at 113 (1996) ("CONFERENCE REPORT").

[3]Interim Study Proposal 95-53 Requesting the Senate Interim Committee on Insurance and Commerce and the House Interim Committee on Insurance and Commerce to Conduct a Study of the Impact of Proposed Federal Regulatory Changes on the Regulatory Authority of the Arkansas Public Service Commission, the State's Telecommunications Industry, and the Citizens of Arkansas, at 1 (filed Nov. 16, 1995) ("Study Proposal"). See Attachment A.

[4]Id.

environment should be designed to maintain universal service for all Arkansas citizens as well as ensure that all competitors compete on fair and equal terms,"[5] the Legislative Council requested the Arkansas PSC to "suspend any pending regulatory proceedings regarding telecommunications issues related to competition and universal service until the findings of the interim committees are issued and pending federal legislation is resolved."[6]

In March 1996 — approximately one month after the enactment of the federal Telecommunications Act — the Co-Chairmen of the Arkansas Telecommunications Subcommittee wrote to the Chairman of the Arkansas PSC, reiterating the General Assembly's request that the Arkansas PSC refrain from issuing regulations or otherwise making policy decisions in any docket "affecting the general level of carrier access charges or universal service funding" until the Legislature ha[d] studied these issues and determined how best "to play the major role in developing telecommunications policy."[7] The Commissioners of the Arkansas PSC agreed not to "take any action which would interfere with or preempt the General Assembly's authority to revise existing telecommunications policy to address changes in federal telecommunications law and technological advances."[8] The Commissioners also acknowledged that "it is the prerogative

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[5]Id.

[6]Id. at 2.

[7]Letter from Senator Jerry Bookout and Representative David Beatty to Chairman Sam I. Bratton (Mar. 4, 1996) ("Bookout/Beatty Letter"). See Attachment B.

[8]Letter from Chairman Bratton and Commissioners Qualls and Kearney to Senator Bookout and Representative Beatty, at 1 (Mar. 12, 1996). See Attachment C.

and the expressed desire of the General Assembly to reform telecommunications policy for the State of Arkansas."[9]

Throughout 1996, the Telecommunications Subcommittee studied the issues and conducted hearings. After considerable debate, the General Assembly passed the Telecommunications Regulatory Reform Act of 1997, and the Governor signed it on February 4, 1997.[10] The operative provisions of the Arkansas Act may be divided into three parts: The first part, comprising sections 4 and 5, concerns the creation of and eligibility for assistance from the Arkansas Universal Service Fund; the second part, comprising sections 6 though 8, concerns local exchange carriers electing to be regulated under a price cap regime; and the third part, comprising sections 9 and 10, concerns the authority of the Arkansas PSC to order incumbent and rural local exchange carriers to interconnect with, sell unbundled network elements to, and allow resale of their retail services by competing local exchange carriers.

The General Assembly was solicitous of the federal requirements throughout the Arkansas Act. For example, section 9(a) authorizes the Arkansas PSC, "[c]onsistent with the Federal Act," to grant certificates of convenience and necessity to telecommunications providers seeking to provide basic local exchange service and/or switched access service. Section 9(d) provides that the Arkansas PSC shall not require an incumbent local exchange carrier to negotiate resale, to provide interconnection, or to sell unbundled network elements to a competing local exchange carrier, "[e]xcept to the extent required by the Federal Act." Section 9(f) provides that the Arkansas PSC's authority with respect to interconnection, resale, and unbundling is limited to that

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[9]Id.

[10]Act 77 of 1997, Senate Bill 54, 81st General Assembly, Regular Session. See Attachment D.

which is "provided in Sections 251 and 252 of the Federal Act (47 USC 251 and 252)." Section 9(g) provides that, "as permitted by the Federal Act," the Arkansas PSC shall approve resale restrictions prohibiting resellers from aggregating the usage of multiple customers on resold local exchange services, purchasing retail local exchange services offered by local exchange carriers to residential customers and reselling those retail services to nonresidential customers, "or any other reasonable limitation on resale to the extent permitted by the Federal Act." Section 9(h) requires incumbent local exchange carriers to provide their competitors with nondiscriminatory access to operator services, directory listings and assistance, and 911 service "only to the extent required in the Federal Act." While section 9(i) requires the Arkansas PSC to approve any negotiated interconnection agreement that satisfies the minimum requirements of section 251 of the Federal Act, it does prevent the Commission from imposing "any interconnection requirements that go beyond those requirements imposed by the Federal Act or any interconnection regulations or standards promulgated under the Federal Act" (emphasis added).

Section 10 of the Arkansas Act, which governs interconnection with rural telephone companies, is similarly consistent with the requirements of federal law. Section 10(a) provides that a rural telephone company has no duty to negotiate interconnection, "unless and until a telecommunications provider has made a bona fide request to the rural telephone company for such services, and the [Arkansas PSC] has determined, in accordance with the Federal Act, that the rural telephone company must fulfill such request" (emphasis added).

## II. The SWBT/ACSI Interconnection Agreement

ACSI is a competitive local exchange carrier that has, through its subsidiary American Communication Services of Little Rock, Inc., negotiated and executed an interconnection

agreement with SWBT. In 1996, ACSI and SWBT negotiated the terms of interconnection pursuant to section 252 of the federal Communications Act; although they managed to resolve most of the issues, they were unable to reach an agreement on the prices for unbundled loops and cross-connects and on the terms and conditions for cross-connects between co-carriers. On August 13, 1996, ACSI filed a petition for arbitration with the Arkansas PSC on these unresolved matters. On October 18, the PSC approved the SWBT/ACSI interconnection agreement subject to arbitration of the few outstanding issues.[11] On November 4, before the Arkansas PSC had the opportunity to conduct the arbitration, SWBT and ACSI reached a settlement and filed a stipulation amending their negotiated interconnection agreement.[12] The Arkansas PSC approved the final agreement on December 10.[13]

**ARGUMENT**

In its petition, ACSI argues that it is entitled to a declaratory ruling that the Arkansas Act is preempted because it prevents the Arkansas PSC from carrying out its responsibilities under the Federal Act to implement local interconnection requirements and to administer universal service

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[11]Order No. 2, In re SWBT's Application for Approval of Interconnection Agreement Under the Telecommunications Act of 1996 with American Communications Services of Little Rock, Inc., Docket No. 96-258-U (filed Oct. 18, 1996). See Attachment E.

[12]ACSI is therefore incorrect when it states in its petition that it "has negotiated and arbitrated an interconnection agreement with [SWBT]." ACSI Petition at 3 (emphasis added). See Joint Response to Order No. 10, In re SWBT's Application for Approval of Interconnection Agreement Under the Telecommunications Act of 1996 with American Communications Services of Little Rock, Inc., Docket No. 96-258-U (filed Nov. 4, 1996) (attaching Stipulation and Agreement). See Attachment F.

[13]Order No. 4, In re SWBT's Application for Approval of Interconnection Agreement Under the Telecommunications Act of 1996 with American Communications Services of Little Rock, Inc., Docket No. 96-258-U (filed Dec. 10, 1996). See Attachment G.

support mechanisms. Specifically, ACSI argues that the Arkansas Act directly conflicts with the Communications Act by "depriv[ing] the Arkansas PSC of the ability to prescribe any additional interconnection requirements, even though such requirements might be appropriate or necessary to the emergence of local competition in Arkansas."[14] ACSI argues further that the Arkansas Act is preempted under section 253(d) because it denies ACSI "the ability to obtain PSC directives mandating incumbent LEC fulfillment of bona fide requests for facilities needed to provide competitive services."[15] Moreover, ACSI suggests that the FCC has authority to assume jurisdiction over interconnection arbitrations under section 252(e)(5). Finally, ACSI argues that the Arkansas Act's eligibility conditions for receiving universal service support are inconsistent with the corresponding requirements contained in section 214(e) of the Federal Act and that these conditions deprive ACSI of a source of support, thereby erecting a barrier to entry under section 253.

None of these arguments finds support in the actual requirements of either the Arkansas Act or the Federal Act. For the reasons discussed below, the Commission should deny ACSI's petition for declaratory ruling.

## I. There is No Conflict Between the Arkansas Act and the Federal Act

The analysis must start with the basic proposition that federal preemption is not favored. "[F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons — either that the nature of the regulated subject matter

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[14]ACSI Petition at 11.

[15]Id. at 15.

permits no other conclusion, or that the Congress has unmistakably so ordained."[16] In a field that the states have traditionally occupied — such as the regulation of local telephone service — courts assume that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[17] Where Congress's regulation is so pervasive that it is reasonable to infer that it intended to leave no room for the States to supplement the federal scheme,[18] Congress's intent to supersede state law may be implicit. The same is true when Congress's action touches upon an area in which the national interest is so dominant that it is reasonable to assume that Congress intended to preclude the enforcement of state laws on the same subject.[19] Moreover, when there is outright or actual conflict between

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[16]Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963); see also New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins., Co., 115 S. Ct. 1671, 1676 (1995) ("despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law"); California v. ARC America Corp., 490 U.S. 93, 101 (1989) (there is a "presumption against finding pre-emption of state law in areas traditionally regulated by the States").

[17]Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[18]See, e.g., Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 98 (1992); Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982); Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 203-204 (1983); Rice, 331 U.S. at 230.

[19]See, e.g., Hines v. Davidowitz, 312 U.S. 52, 67-68 (1941) (in determining whether state alien registration statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, . . . it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority").

federal and state law,[20] where inconsistent state regulation negates valid federal goals,[21] or where compliance with both federal and state law is not possible as a practical matter,[22] preemption may occur. But where Congress has neither exclusively occupied the field nor legislated in an area traditionally considered the sole province of the national government, and where there is no direct conflict between federal and state law, Congress's intent to supplant state authority must be explicit.[23]

The Federal Act expressly leaves a broad role for the States in telecommunications regulation. See, e.g., 47 U.S.C. §§ 152(b) (limiting FCC jurisdiction); 252 (local interconnection); 254(a)(1) & (f) (universal service). Moreover, it is difficult to imagine how the Arkansas General Assembly could have been clearer in its intent to avoid conflict between provisions of the Arkansas Act and corresponding provisions of the Federal Act. Section 9 of the Arkansas Act tracks the interconnection, unbundling, and resale requirements of the Communications Act, providing no more and no less than that which is required under federal law. Section 10 is similarly drafted to preclude any conflict with federal statutory requirements.

The Arkansas General Assembly indicated in the section entitled "Legislative Findings" that it enacted the Arkansas Act to "[p]rovide for a system of regulation of telecommunications services, consistent with the Federal Act, that assists in implementing the national policy of

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[20]Free v. Bland, 369 U.S. 663, 666 (1962).

[21]Illinois Bell Tel. Co. v. FCC, 883 F.2d 104, 116 (D.C. Cir. 1989); see also Michael J. Zpevak, FCC Preemption After *Louisiana PSC*, 45 FED. COM. L.J. 185, 199, 206 (1993).

[22]Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368 (1986); Florida Lime & Avocado Growers, 373 U.S. at 142-43.

[23]Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 605 (1991).

opening the telecommunications market to competition on fair and equal terms . . . ."[24] And in justifying its use of emergency legislative powers to promulgate the Arkansas Act, the Arkansas General Assembly concluded that "[i]t is essential that the State of Arkansas immediately revise its existing regulatory regime for the telecommunications industry to ensure that it is consistent with and complementary to the Federal Telecommunications Act of 1996."[25]

The Arkansas Act, therefore, is expressly consistent with the requirements of federal law. ACSI, however, dismisses what it calls "the liberal usage of 'to the extent required by the Federal Act' and similar phrases" as mere verbiage designed to head off petitions for preemption. According to ACSI, while the FCC is tasked with "nurtur[ing] competition to the maximum extent possible," the Arkansas Act "orders the Arkansas PSC to take action that promotes competition only to the minimum extent required. These two conflicting policy goals cannot be reconciled."[26]

This is nonsense. Both the Telecommunications Act and the Arkansas Act represent carefully drawn compromises among different policy goals. Both Acts have the primary purpose of "provid[ing] for a pro-competitive, de-regulatory . . . policy framework"[27] to ensure that all citizens benefit from the best prices and the best service that the market can offer. On the other hand, both Congress and the Arkansas General Assembly were acutely aware that States must continue to bear the responsibility for "protect[ing] public safety and welfare, ensur[ing] the

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[24]Arkansas Act § 2(1) (emphasis added).

[25]Id. § 16(III) (emphasis added).

[26]ACSI Petition at iii (emphasis in original).

[27]CONFERENCE REPORT, supra note 2, at 113.

continued quality of telecommunications services, and safeguard[ing] the rights of consumers."[28] In Arkansas, the General Assembly found that bearing this responsibility meant "recogniz[ing] that a telecommunications provider that serves high cost rural areas or exchanges faces unique circumstances that require special consideration and funding to assist in preserving and promoting universal service."[29]

The Arkansas General Assembly may promote these goals, within the limits of federal law, in any way it chooses. The Arkansas PSC is a creature of the State; it has no rights or authority beyond that which the General Assembly chooses to grant.[30] As the Legislative Council made clear back in November 1995 and as reiterated by the Chairmen of the Telecommunications Subcommittee in their March 1996 letter to the Arkansas PSC, the significant public policy choices involved in reforming telecommunications law "should be set by the Arkansas Legislature, not by the courts or regulatory agencies."[31] If, as ACSI argues, Arkansas is free to empower its PSC to impose certain obligations beyond those mandated by federal law, it is also free to withhold from the PSC the ability to impose additional requirements not mandated by federal law.

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[28]47 U.S.C. § 253(b). See also Arkansas Act § 2(1) (purpose of legislation was to assist "in implementing the national policy of opening the telecommunications market to competition" by modifying outdated regulation, eliminating unnecessary regulation, and preserving and advancing universal service).

[29]Arkansas Act § 2(2).

[30]See, e.g., Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 593 S.W.2d 434, 440 (Ark. 1980) ("It must be remembered that the PSC is a creature of the legislature . . . . The commission was created to act for the General Assembly and it has the same power that body would have when acting within the powers conferred upon it by legislative act").

[31]Study Proposal, supra note 3, at 1; see also Bookout/Beatty Letter, supra note 7 ("the Legislature intends to take a proactive role in developing telecommunications policy in this State").

ACSI purports to find support for its argument that the Arkansas PSC must be permitted to go beyond the requirements of the Federal Act in this Commission's statement that State commissions "are free to prescribe additional elements" beyond those identified in the First Report and Order.[32] This sentence merely recognizes that individual States may decide for themselves whether to impose additional obligations. The FCC was not suggesting, as ACSI now argues, that State commissions are empowered as a matter of federal law to thwart the intentions of their own legislatures. Indeed, ACSI itself admits as much when it acknowledges that the "Arkansas State Legislature may limit the activity of the Arkansas PSC, or even abolish it entirely,"[33] so long as there exists some entity under state law that can perform the duties of a "State commission."[34]

Of course, the General Assembly has not come close to abolishing the Arkansas PSC. What it has done is to prohibit the PSC from imposing local interconnection, unbundling, or resale requirements beyond those that are required under the Communications Act, thereby seeking to avoid what it perceived to be a potential threat to the best interests of the citizens of Arkansas. Nothing in the Communications Act or the FCC's First Report and Order invalidates this implementation of state policy regarding intrastate services.

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[32]See First Report and Order, In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, ¶ 366 (Aug. 8, 1996) ("First Report and Order"); ACSI Petition at 10.

[33]ACSI Petition at 8.

[34]A "State commission" is defined as "the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers." 47 U.S.C. § 153(41).

## II. ACSI Has Failed to Justify Preemption Under Section 253(d)

Congress was remarkably clear in the Telecommunications Act about the extent to which federal law should have preemptive effect.[35] Lest there be any confusion on this point, Congress explicitly provided that there is to be no preemption by implication: "This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."[36] Congress made manifest that — absent a direct conflict — the Telecommunications Act preempts state law only where Congress expressly provides for it.

In section 253, Congress authorized the FCC to preempt enforcement of any "State or local statute or regulation, or other State or local legal requirement" that "ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[37] Congress made clear, however, that not every instance of conflict or inconsistency should be subject to preemption: "Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 [governing universal service], requirements necessary to preserve and advance universal service, protect the public

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[35] See, e.g., 47 U.S.C. § 271(e)(2)(B) ("a State may not require a Bell operating company to implement intraLATA toll dialing parity in that State before a Bell operating company has been granted authority under this section to provide interLATA services originating in that State or before 3 years after the date of enactment of the Telecommunications Act of 1996, whichever is earlier"); id. § 276(c) ("[t]o the extent that any State requirements are inconsistent with the Commission's [payphone service] regulations, the Commission's regulation on such matters shall preempt such State requirements"); Telecommunications Act § 602(a) ("[a] provider of direct-to-home satellite service shall be exempt form the collection or remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service").

[36] Telecommunications Act, § 601(c)(1).

[37] 47 U.S.C. § 253(a), (d).

safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."[38]

Nothing on the face of the Arkansas Act has the effect of prohibiting ACSI or any other entity from providing a telecommunications service. ACSI has made no attempt to explain — let alone prove — how the Arkansas Act actually prohibits it from "provid[ing] any interstate or intrastate telecommunications service." In mounting a "facial challenge" to the Arkansas Act, ACSI has the burden of demonstrating that there is no possible way for the Arkansas Act to be applied in a manner that would not have "the effect of prohibiting" it from providing any telecommunications service in Arkansas.[39] Unless ACSI can demonstrate through appropriate evidence that such a requirement necessarily or in a particular application "has the effect of prohibiting" it from providing telecommunications services in Arkansas, there is no conflict between the Arkansas Act and the Communications Act. ACSI has not even attempted to make the necessary showing.

## III. ACSI Has Improperly Invoked Section 252(e)(5)

Section 252(e)(5) of the federal Communications Act grants the FCC authority to preempt a State commission's jurisdiction over interconnection agreements only when "a State commission fails to act to carry out its responsibility" under section 252. In the First Report and Order, the FCC explained what it understood to be the scope of its authority under section 252(e)(5):

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[38]Id. § 253(b).

[39]See California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 579-80 (1987) (party making a facial challenge to state regulations based on preemption required to demonstrate "that there is no possible set of conditions [the State] could place on its permit that would not conflict with federal law — that any state permit requirement is per se preempted"); Chemical Specialties Mfrs. Ass'n v. Allenby, 958 F.2d 941, 943 (9th Cir.), cert. denied, 506 U.S. 825 (1992).

> [T]he Commission interprets "failure to act" to mean a state's failure to complete its duties in a timely manner. This would limit Commission action to instances where a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C). The Commission will place the burden of proof on parties alleging that the state commission has failed to respond to a request for mediation or arbitration within a reasonable time frame.[40]

In addition, the FCC indicated "that parties should be required to file a detailed written petition, backed by affidavit, that will, at the outset, give the Commission a better understanding of the issues involved and the action, or lack of action, taken by the state commission. Allowing less detailed notification increases the likelihood that frivolous requests will be made."[41]

ACSI's petition in this case is clear proof that the FCC's concerns were justified. Far from "stating with specificity the basis for the petition and any information that supports the claim that the state has failed to act,"[42] ACSI has not even alleged, much less demonstrated, that the Arkansas PSC has failed in any way to carry out its responsibilities under section 252. Indeed, ACSI concedes that it is not claiming that the Arkansas PSC has ever failed to act within a reasonable period to carry out its responsibilities under section 252 of the Communications Act.[43] Instead, ACSI states that, under the Arkansas Act, the PSC "cannot act at all within the meaning of the Communications Act."[44]

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[40]First Report and Order, supra note 32, ¶ 1285 (emphasis added).

[41]Id. ¶ 1287.

[42]Id. ¶ 1288.

[43]ACSI Petition at 15.

[44]Id.

This is preposterous. Sections 9 and 10 of the Arkansas Act fully empower the Arkansas PSC to satisfy all of its responsibilities under the Federal Act. If, in a particular case and under specific facts, ACSI or some other party can identify a circumstance when the Arkansas PSC, whether because of limitations in its statutory authority or for some other reason, fails to carry out its obligations under section 252, then — and only then — will a predicate exist for a possible order preempting the PSC's jurisdiction of any proceeding under section 252. But where there has been no failure to act, the FCC's authority under section 252(e)(5) cannot be triggered.

## IV. There is No Conflict Between the Arkansas and Federal Universal Service Provisions

With respect to universal service under the Arkansas Act, the General Assembly took steps to ensure that these provisions would not conflict with federal requirements. So, for example, section 5(b) of the Arkansas Act provides that where a non-rural incumbent local exchange carrier receives support from the Arkansas Universal Service Fund ("AUSF"), the Arkansas PSC may designate other telecommunications providers to be eligible for high cost support under certain conditions "consistent with Section 214(e)(2) of the Federal Act." Similarly, where an eligible carrier seeks to relinquish its eligibility designation, the Arkansas PSC is authorized to grant the request upon a finding that at least one eligible carrier will continue to serve the area, "consistent with Section 214(e)(4) of the Federal Act."[45]

After describing in detail how the eligibility conditions for receiving support from the AUSF differ from those set out in section 214(e) of the Communications Act, ACSI concedes that the Communications Act as well as "the anticipated FCC rules implementing it admittedly apply

[45] Arkansas Act § 5(c).

only to the federal universal service support program."[46] Therefore, despite certain differences, there are no inconsistencies between the Arkansas Act and section 214 of the federal Communications Act; the former applies to Arkansas' intrastate universal service fund while the latter applies only to the federal, interstate universal service fund.

Moreover, ACSI cannot prevail on its claim that the Arkansas Act is inconsistent with Federal requirements when those requirements have not yet been established. ACSI admits that the "FCC has not yet issued final rules implementing the federal universal service program under Sections 254 and 214(e),"[47] but it nonetheless seeks a declaration that the Arkansas requirements are "inconsistent with the Commission's rules to preserve and advance universal service."[48] Pursuant to the statutory timetable, the Federal-State Joint Board on Universal Service issued its recommendations on November 8, 1996,[49] and the FCC has until May 8, 1997, to complete its "proceeding to implement the recommendations from the Joint Board."[50] A state is permitted to adopt its own universal service fund program so long as it is "not inconsistent with the Commission's rules" and does "not rely on or burden Federal universal service support

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[46]ACSI Petition at 19 (emphasis added).

[47]Id. at 16-17.

[48]47 U.S.C. § 254(f).

[49]See Recommended Decision, In re Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (Nov. 8, 1996).

[50]47 U.S.C. § 254(a)(2).

mechanisms."[51] The new rules and support mechanisms are not yet in pace, so they cannot conflict with the Arkansas Act.

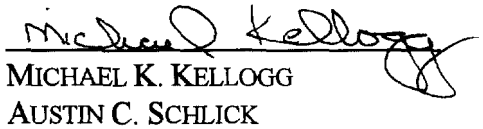
ACSI has also failed to show that the Arkansas Act's universal service provisions actually have the effect of prohibiting the ability of an entity to provide any interstate telecommunications service, as required for preemption under section 253. The fact that section 5 of the Arkansas Act places certain conditions on the eligibility of telecommunications carriers to receive funding from the AUSF is not grounds for preemption unless and until ACSI can show that these particular conditions have the effect of prohibiting it from providing a telecommunications service. ACSI has not even attempted such a showing.

[51] Id. § 254(f).

## CONCLUSION

For the foregoing reasons, SWBT requests that the FCC deny ACSI's petition for declaratory ruling.

Respectfully submitted,

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